

DATE: July 31, 2002

In Re:

[Redacted]

Claimant

Claims Case No. 02061109

CLAIMS APPEALS BOARD DECISION

DIGEST

When a member is aware that she has received a payment that she is not entitled to, she does not acquire title to the excess amounts, and has a duty to hold the money for eventual repayment. If she does not do so, she is not without fault, and waiver cannot be granted.

DECISION

A Navy service member appeals the February 15, 2002, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 02020408, wherein DOHA sustained the decision of the Defense Finance and Accounting Service (DFAS) not to grant the member a waiver for the erroneous overpayment of pay and allowances.

Background

The record shows that the service member was entitled to receive a retroactive payment of Basic Allowance for Housing (BAH) for the period June 11, 1999, through December 31, 2000. According to DFAS, the member's BAH should have been computed on the monthly rate of \$395 until December 15, 1999, and \$514 for 2000.⁽¹⁾ Therefore she was entitled to receive \$9,390.78. However, due to administrative error, the member's BAH was erroneously computed on a monthly rate of \$690.20 for 1999, and \$872.50 for 2000. The resulting error caused the member to be paid \$15,989.43 for retroactive BAH on her January 2001 leave and earnings statement (LES), or an overpayment of \$6,598.65.

DFAS also reports that the member was entitled to receive BAH at the monthly rate of \$561.70 from January 1, 2001, until August 30, 2001. However, due to administrative error, the member was paid at the monthly rate of \$872.50 from January 1, 2001, through June 30, 2001, and \$983.55 from July 1, 2001, through August 30, 2001. Thus, the member was overpaid \$2,397.41 for the period of January 1, 2001, through August 30, 2001, and \$8,996.06 for the entire period between June 11, 1999, and August 30, 2001.

In support of her waiver application, the member noted that she was deployed during the period from February 2001 through July 2001 and did not receive any LES during that time. The member also points out that upon her return from deployment she found the BAH rate to be excessive and immediately contacted appropriate officials. The member argues that the problem was caused by administrative error.

DFAS recommends that we deny waiver because the member received her January 2001 LES prior to going on deployment. If she had questioned the excessive payment at that time, DFAS argues that the member would have corrected the retroactive BAH overpayment and prevented any future overpayment.

Discussion

Under Section 2774 of title 10, United States Code (10 U.S.C. § 2774), this Office may waive claims of the United States against members or former members of the uniformed services of the United States only when collection would be against equity and good conscience and not in the best interest of the United States. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). On the other hand, a waiver cannot be granted if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member or anyone else having an interest in obtaining a waiver. When a member is aware that she has received an erroneous overpayment, the member should be prepared to return the excess amount to the government. *See DOHA Claims Case No. 98051107* (July 28, 1998). A member cannot reasonably expect to retain such an overpayment, absent official notice that the payment was correct.

In the instant case, while we recognize that the erroneous payments were due to administrative error, and the member informed appropriate officials of the error, those facts, by themselves, do not provide a basis for waiver. *See DOHA Claims Case No. 02062402* (July 18, 2002); and *DOHA Claims Case No. 02040402* (May 9, 2002).⁽²⁾ The January 2001 retroactive BAH payment was well in excess of the member's proper entitlement, and the member does not dispute this.⁽³⁾ To obtain waiver, a member must be able to reasonably articulate a basis for expecting payment in the amount that she erroneously received. *Compare DOHA Claims Case No. 01091310* (October 5, 2001), and *DOHA Claims Case No. 99033117* (April 15, 1999). The member should have questioned the January 2001 BAH payment and brought this matter to the attention of proper authorities, as soon as she noticed it, prior to her deployment.⁽⁴⁾ She is at least partially at fault for failing to do so. The member does not acquire title to the excess payments merely because the government made an administrative error, and the member has a duty to return the erroneous amounts to the government when asked to do so. *See DOHA Claims Case No. 99033117, supra*.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. The member was an E-4 until December 15, 1999. She was promoted to pay grade E-5 effective December 16, 1999, at a monthly BAH rate of \$458. The E-5 rate increased to \$514 effective January 1, 2000, but was initially reported to us as \$513.70. The difference between the 2000 monthly rate of \$514 versus \$513.70 may have resulted in a slight overstatement of her debt, but does not affect the outcome of this case.
2. The standards for waiver for civilian employees are the same.
3. The average monthly BAH payment the member received for 1999 and 2000, as contained in the single retroactive payment, even exceeded the monthly rate for an E-9.
4. The member's orders indicate that her deployment began February 22, 2001.